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JUN 14

MICHAEL RODAK, J

in the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1692

D.D.I., INC., DANOV CORPORATION, JESSIE GEORGE DERISO, ESTUARY CORPORATION, MIAMI FIRST-AND-EIGHTH CORPORATION, RAMGOW, INC., REDWING PROPERTIES, INC., VEDA LOCATIONS, INC., and VOLUSIA LOCATIONS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims

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Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Court of Claims in the above captioned case on October 13, 1972.

CITATION OF OPINION BELOW

The Opinion of the Court of Claims below is officially reported at 467 F.2d 497 and is further reproduced in full in the appendix.

JURISDICTION

The decision of the United States Court of Claims granting the Motion for Summary Judgment of the United States was entered on October 13, 1972. Petitioner's Motion for Rehearing was denied by an Order entered on March 16, 1973. The jurisdiction of this Court is invoked under the provision of 28 U.S.C. Section 1255(1).

QUESTIONS PRESENTED

I.

DOES THE ATTORNEY GENERAL HAVE AUTHORITY TO SETTLE THE TAX LIABILITY OF CORPORATIONS NOT IN SUIT WHEN THE STATUTE, 26 U.S.C. 7122, GIVES SUCH AUTHORITY SOLELY TO THE SECRETARY OF THE TREASURY OR HIS DELEGATE.

II.

DOES THE THEORY OF ESTOPPEL APPLY SO AS TO PRECLUDE A TAXPAYER WHO HAS ENTERED INTO AN UNENFORCEABLE SETTLEMENT AGREEMENT WITH THE GOVERNMENT FROM FILING AN ADMITTEDLY VALID REFUND SUIT AFTER THE PERIOD HAS PASSED WITHIN WHICH THE INTERNAL REVENUE SERVICE MAY ASSESS A FURTHER DEFICIENCY.

STATUTES INVOLVED

26 U.S.C. §7121. Closing Agreements.

"(a) Authorization. The Secretary or his delegate is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

"(b) Finality. If such agreement is approved by the Secretary or his delegate (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact:

1. The case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

2. In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

26 U.S.C. §7122. Compromises.

(a) Authorization. The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Depart-

ment of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record. Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of:

1. The amount of tax assessed.
2. The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and
3. The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500. Aug. 16, 1954, c. 736, 68A Stat. 849.

STATEMENT OF THE CASE

The suit below was for refund of interest paid on income taxes assessed under §531 of the Internal Revenue Code of 1954, 26 U.S.C. 531. The tax and interest came to be paid in the following manner.

The Internal Revenue Service proposed to assess accumulated earnings taxes in various amounts against the

respective Petitioners below. As a result of negotiations between the Service and counsel for the Petitioners, assessment of the taxes was delayed pending the outcome of three tax refund suits involving identical facts and circumstances. On April 16, 1968, counsel for the litigating corporations in the refund suits by letter proposed settlement of these suits by fixing accumulated earnings tax liability at 25% of the amount paid. The offer was conditioned upon agreement by the Service (not the Department of Justice) to settle the liability of the Petitioners on the same basis, 25% of the proposed assessment. The Attorney General accepted the settlement offer of the litigating corporations by letter.

The Service verified the amounts of the agreed deficiencies and submitted said verified deficiencies to the Petitioners on Treasury Form 870 entitled "Waiver of Restrictions on Assessment". The Petitioners immediately executed and delivered to the Commissioner these forms and returned them with their tax payments. The forms were, by their express terms, not binding on either the Government or the Petitioners. No closing agreement or other document purporting to bind either Petitioners or Government was executed or proposed. Interest was paid by the Petitioners on the agreed deficiency, computed from the date of the corporate return for the year involved.

On January 23, 1970, the Court of Claims handed down its decision in *Motor Fuel Carriers, Inc. v. United States*, 190 Ct.Cl. 385, 420 F.2d 702 (1970) which held that §531 tax was in the nature of a penalty, and that therefore interest ran only from the date of assessment by the Commissioner, and not from the date of the corporate return for the tax year.

Petitioners filed timely claims for refund of interest paid and these claims were disallowed at various dates from August 21, 1970, through November 20, 1970. Thereafter, Petitioners timely filed suit for refund in the Court of Claims.

On October 13, 1972, the Court of Claims rendered its decision granting Respondent's Cross-Motion for Summary Judgment. The Court of Claims ruled upon the pleadings and Petitioner's affidavit that the taxpayers were bound by the Settlement Agreement; that the Attorney General had authority to settle Petitioner's tax liability; and further that the Petitioners were estopped from claiming refund even if the Attorney General had not acted with authority.

REASONS FOR GRANTING WRIT

I

Authority of the Attorney General

The tax matters of the non-litigating corporations were not referred to the Department of Justice but were still under negotiation with the Commissioner of Internal Revenue. (Opinion, appendix A-1) The Attorney General therefore was without express statutory authority to execute any binding agreement with the taxpayers.

The corporations in litigation had made it a condition of their settlement, that the liability of the Petitioners be adjusted on the same basis, 25% of the proposed assessment against each. The Court below found that the Attorney General had authority to settle the tax liability of the non-litigating corporations under 26 U.S.C. § 7122(a), quoted above, *in spite of its finding that there had been no reference of their cases to the Attorney General*, on the

grounds that he could settle matters "germane" to a matter in litigation. 38 Op. Att'y. Gen. 98,102 (1934).

The "germane" test was adopted by the Attorney General to deal with the problems of allocation of tax liability to prevent the government from being "whipsawed". This problem arises where settlement with one taxpayer is necessarily inconclusive of the tax controversy, as where a compromise with one taxpayer is made and a position inconsistent with that compromise is taken by a related taxpayer not a party to the compromise. Examples of this are valuation of assets for estate tax purposes, which affects gain or loss on later disposition, or where the controversy is over the status of a family partnership, where questions of allocation of income exist. The very real need in such situations for settlement embracing taxpayers other than the one in suit has resulted in the Attorney General exercising an authority to settle beyond that permitted by the face of the statute. See Seidman, "Chief of Review Section Views," 1969 So.Calif. Law Inst. 57, 78-80.

The case at bar is far different, however. Here the only relationship between the Petitioners and the litigating corporations is that they have similar tax problems. The liabilities are not reciprocal and there has been no contention that Petitioners' taxes in any manner, directly or otherwise, affect the liabilities of the litigating corporations.

The court below found that Petitioner's tax matters were "germane". It relied for this finding on the concept that Petitioners made their cases "germane" by requiring that they be settled on the same basis as the refund suits. Such a holding is based on the thesis that the taxpayer can confer authority on the Attorney General in derogation of statute. This is in clear conflict with the face of the statute,

which authorizes the Attorney General to settle only those cases referred to him by the Treasury. No such referral, as to the present Petitioners, was found by the court below.

The holding below also conflicts in principle with the Court of Appeal for the Seventh Circuit which in *Brubaker, et al, v. United States*, 342 F.2d 655 (7th Cir. 1965) held that the Attorney General had no authority to settle where a particular tax controversy had not been referred to him. In *Brubaker*, the Des Plaines Oil Co. had a controversy as to its liability for overcharges under the Renegotiation Act of 1943 (56 Stat. 226, 445 §403). There was also an assessment of excess profits tax against transferees of the company's assets by the Service.

In holding that a settlement with the Attorney General of the renegotiation claims could not include a settlement of the excess profits tax, the Seventh Circuit said:

> "As the Government notes in its brief, the excess tax liability dispute was with the Commissioner of Internal Revenue and such liabilities cannot be compromised by the Attorney General or the Department of Justice unless and until the Commissioner refers the same to the Department for prosecution or defense. I.R.C. of 1954, §7122(a), I.R.C. of 1939, §3761(a). Prior to such reference to the Department of Justice, Congress has prescribed action by the Secretary of the Treasury or his delegate as the 'exclusive method by which these liabilities could be compromised. *Botany Worsted Mills, v. United States*, 278 U.S. 282, 288, 289 (1929); *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294-295 (1941)." *Brubaker v. United States, supra.*

The decision below further raises issues of great public importance, relating to the authority of the Attorney General, and to the division of responsibility between the Attorney General and the Treasury. It represents the proposition that where the Attorney General has a case in litigation, he may purport to settle all other cases involving similar facts should the taxpayers express a preference to deal with the Attorney General instead of the Secretary of the Treasury.

This expansion of the settlement authority substantially alters the division of authority created by statute. Previously, the Service exercised such authority, its primary consideration being questions of tax policy. The Attorney General, on the other hand, was much more concerned about the practical hazards of litigation. See Seidman, "Chief of Review Section Views", *supra.*

The Court below asserted in passing, that Petitioners below "do not contest the fact that the Treasury Department authorized the Department of Justice to make this settlement." The reason Petitioners did not contest this was because it was not factually alleged nor was there evidence that authorization was given in accordance with the statute. 26 U.S.C. 7121, 7122. It is clear that effective authorization must be in strict compliance with the statute. *Botany Worsted Mills v. United States*, 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929).

We also note that the Solicitor General of the United States, Erwin N. Griswold, in a law review note in 57 Harvard Law Review, 912 (1944) recognized the great public interest involved in the question of the delegation of settlement authority.

II

ESTOPPEL

As to the applicability of the doctrine of estoppel to preclude these refund suits, the decision of the Court of Claims below and decisions of certain Courts of Appeal, *Daugette v. Patterson*, 250 F.2d 753 (5th Cir. 1957), cert. den., 356 U.S. 902, 78 S.Ct. 561, 2 L.Ed. 2d 580, and *Cain v. United States*, 255 F.2d 193 (5th Cir. 1958) conflict in principle with decisions by other Courts of Appeal, *Unita Livestock Corp. v. United States*, 355 F.2d 761 (10th Cir. 1966), and *Joyce v. Gentsch*, 141 F.2d 891 (6th Cir. 1944).

The only decision of this Court on the question is *Botany Worsted Mills, v. United States, supra.* There, this Court found that an informal compromise agreement was not binding upon the Government since it was made without authority, and therefore it was not binding upon taxpayers. Commenting upon the argument that the taxpayer should nevertheless be estopped, the Court said:

> "And, without determining whether such an agreement, though not binding in itself may when executed become, under some circumstances, binding on the parties by estoppel, it suffices to say that here the findings disclose no adequate ground for any claim of estoppel by the United States." *Botany Worsted Mills v. United States, supra*, 289.

This statement has been generally interpreted to mean that estoppel is available to preclude a refund suit by a taxpayer under some circumstances. Opinion below, (appendix A-1).

Estoppel is very generally recognized to require a misrepresentation on the part of the person claimed to be estopped, and reliance on that misrepresentation, to the detriment of the other party. *Van Antwerp v. United States*, 92 F.2d 871, 875 (9th Cir. 1937). *Daugette v. Patterson, supra*, and *Cain v. United States, supra*, 199 have held that an agreement by the taxpayer not to sue for a refund, (which is not enforceable) is a misrepresentation when the taxpayer later sues for refund. *Unita Livestock Corp. v. United States, supra, Bank of New York v. United States*, 170 F.2d 20, 24, (3d Cir. 1948) and *Joyce v. Gentsch, supra*, have all held that an agreement not enforceable against the taxpayer for lack of mutuality was not a misrepresentation for purposes of the doctrine of estoppel.

As to whether or not detriment is present by reason of the statute of limitations having run against the government there is similarly a division of authority. *Daugette v. Patterson, supra*, held that the running of that statute was sufficient detriment while *Unita Livestock Corp. v. United States, supra*, is directly contrary on the grounds that the government is entitled to set off against the claim for refund an additional deficiency, under the doctrine of equitable recoupment, available to the government under *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421. Accord, *Joyce v. Gentsch, supra*, 896.

The opinion below apparently alters the position taken by the Court of Claims in *Guggenheim v. United States*, 111 Ct.Cl. 165, 182, 77 F.Supp. 186, 196 (1948) cert. den. 335 U.S. 908, rehearing denied, 336 U.S. 911 (1949), and follows the case of *Cooper Agency v. United States*, 301 F.Supp. 871 (1969) affirmed per curiam 422 F.2d 1331

(4th Cir. 1970), certiorari denied, 400 U.S. 904 (1970), which found the mere running of the statute was insufficient, but that there was detriment to the Government where the settlement sought to be avoided was one which involved questions of allocation of income tax between various taxpayers.

Although the Court of Claims below purported to place its decision on the point of detriment on this ground, i.e. that the Government has been precluded from reopening the cases of the litigating corporations there was no finding of fact in support thereof, nor is there any support in the record below. Petitioners are unrelated corporations, and there was never any question of allocation of income or tax between Petitioners. They were treated together solely because their tax questions involved similar facts and circumstances. The rationale of *Cooper Agency* does not apply to Petitioners. Further, the Petitioners would point out that all of the taxpayers involved in the earlier settlements, *including the litigating corporations*, were Petitioners below and are Petitioners here.

Further, there is no finding in the opinion below that the Government either could or would have asserted any further deficiency against any Petitioner. There is, therefor, no showing of detriment, except for the mere fact of the running of the statute of limitations.

The next area of conflict and confusion and the application of the doctrine of estoppel is whether the Government has any right to rely upon a settlement agreement which the Government necessarily knows is not binding since it lacks mutuality. No specific mention of the element of reliance is made in the opinion below, but it is, of

course, a necessary element of estoppel. *Unita Livestock Corp. v. United States, supra,* indicated that there was no occasion for reliance where the Commissioner should have been aware of the doubtful validity of an agreement not in compliance with the statute.

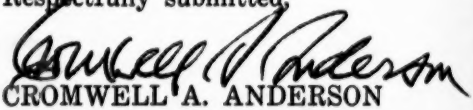
The application of the doctrine of estoppel to bar a suit for refund is continuing importance in the administration of the tax laws. Because the statutory procedures for binding settlements are time consuming, and require the time and attention of high level officials, they are used reluctantly. 9 Mertens, Law of Federal Income Taxation, § 52.14; Sugarman, "Federal Tax Rulings Procedure" 10 Tax L. Rev. 1, 16 (1954). The government, therefore, as a regular administrative practice, uses forms by which the taxpayer purports to bind himself not to sue for refund, but which do not bind the Government.

As a result, questions of the applicability of the doctrine of estoppel frequently arise, and in the interests of good judicial practice, the application of the principle should be settled by this Court.

CONCLUSION

Wherefore Petitioners pray that this Court grant certiorari to review the judgment of the Court of Claims.

Respectfully submitted,



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